

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF PSYCHOLOGY

In the Matter of the Psychology License of
Errol C. Jeffrey-Smith, Ed.D., L.P. License
No. LP 0284

**ORDER DENYING
COMMITTEE'S MOTION FOR
EXAMINATION AND GRANTING
COMMITTEE'S MOTION TO COMPEL
RESPONSES TO DISCOVERY**

The above-entitled matter is before Administrative Law Judge Steve M. Mihalchick upon the Motions of the Complaint Resolution Committee (Committee) of the Minnesota Board of Psychology (Board) for an order requiring Respondent to submit to a mental health examination and for an order compelling Respondent to respond to the Committee's written discovery requests. The Motion for Examination was served by mail on May 9, 1997. Pursuant to a previous Order of the Administrative Law Judge, Respondent's response to the motion was due by June 6, 1997. The Motion to Compel was served on June 12, 1997, and contained a notice to Respondent that if he wished to contest the motion, he must file a written response within ten working days. No responses have been filed as of the date of this Order.

The Committee is represented by Jacquelyn E. Albright, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103. Respondent Errol C. Jeffrey-Smith Ed.D., L.P., Rural Route 3, Box 157, Shoals, Indiana 47581-9530, has previously appeared on his own behalf in this matter.

Based upon the record herein, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. The Committee's Motion for Examination is DENIED.
2. The Committee's Motion to Compel is GRANTED. Respondent shall respond to the Complaint Resolution Committee's Interrogatories: Set #1, Request for Admissions: Set #1, and Request for Production of Documents: Set #1, all within five days from receipt of this Order.
3. Failure to comply with this Order will constitute a default. If a default occurs, the allegations or issues set out in a Notice of and Order for Hearing may be taken as true or deemed proved without further evidence and the matter may be disposed of adversely to Respondent.

Dated this 10th day of July 1997

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Motion for Mental Health Examination

The Committee has moved for an Order pursuant to Minn. R. Civ. P. 35.01 requiring Respondent to submit to a mental health examination to determine whether he suffers from a mental condition which adversely affects his ability to practice psychology with reasonable skill and safety to patients. Such a condition is the basis for disciplinary action under Minn. Stat. § 148.941, subd. 2(a)(9), and Minn. R. 7200.4810, subp. 2.D.

In the Amended Notice of and Order for Hearing (Notice of Hearing), it is alleged that Respondent used his psychology license to sexually exploit five female participants in a church-sponsored grief and support group. It is alleged that Respondent used his status as a licensed psychologist to gain status and intimacy with the women and subsequently exploited them for his own sexual benefit. In two telephone conferences with Respondent and the Committee's counsel and in correspondence to the ALJ, Respondent has denied the allegations, and has stated that he was in a dating relationship with two of the women, not a professional relationship, and that their allegations have been confused with the other women indicated in the Notice of Hearing. Respondent has also indicated that his health has declined greatly since the allegations in this matter have been made, that he is suffering from extreme stress, and that his blood pressure is out of control. He has stated that his condition has made it impossible for him to travel to Minnesota to arrange for his defense in this matter, although as of April 21, 1997, he had intended to be in Minnesota during July. Thus, it was ordered on April 21, 1997, that he appear for his deposition in Minnesota no later than July 31, 1997. Likewise, the Committee has requested that he be ordered to appear for the mental health examination on or before July 31, 1997.

The Committee asserts that it is entitled to an order for a mental health examination because the alleged sexual exploitation of five women raises the issue of whether Respondent's behavior is predatory and places his mental fitness to practice his profession in controversy. The Committee argues:

A comprehensive view of the allegations leads to the conclusion that Respondent has a need to enhance his status with women as a means of gaining intimacy with them. This enhancement is achieved by Respondent's use of his professional license with vulnerable women who have been told by Respondent to trust him completely to provide the

psychological help they need. The repeated pattern of this activity, as demonstrated by the five separate reports, is further indication that the cause of Respondent's sexually-exploitive behavior is a mental health condition which adversely impacts his interaction with the vulnerable women who look to him for psychological help.

Memorandum in Support of Committee's Motion for Examination at 4.

In a related area, Minn. Stat. § 147.091, subd. 6, specifically authorizes the Board of Medical Practice, if it has probable cause to believe that a physician is unable to practice medicine with reasonable skill and safety to patients by reason of illness or as a result of any mental or physical condition, to direct the physician to submit to a mental or physical examination. The statute also provides that persons licensed by the Board of Medical Examiners are deemed to have consented to submit to such examination. This Administrative Law Judge and the Board of Medical Practice have held that, "For probable cause to exist, the objective facts must support an honest and strong suspicion that the physician is unable to practice medicine with reasonable skill and safety to patients due to a mental or physical condition." *In the Matter of the Medical License of Diane B. Humenansky, M.D.*, Report of Administrative Law Judge, December 21, 1994; Order of Board of Medical Practice, March 17, 1995. In that case, a finding of probable cause was made based in part upon the report and testimony of a psychiatrist who had reviewed all the records in the matter. He expressed the opinion that the data presented a strong suspicion that the physician had difficulty with her thinking, used judgment inappropriate in clinical settings, posed a danger to some patients, and was in need of an examination to determine if her thinking was intact and if she was capable of good patient care. He also testified that the physician's poor judgment was the result of mental impairment rather than poor training and that the impairment was very real and required evaluation.

The Board has acknowledged that, unlike the Medical Practice Act, the Psychology Practice Act, Minn. Stat. §§ 148.88 to 148.98, does not include specific statutory authority to order a mental health evaluation. Thus, the Committee argues, it is only during discovery that the Committee can ascertain such mental health information. Committee's Memorandum at 5, footnote 1. The Committee relies on Minn. R. Civ. P. 35.01, which allows a court to order a person to submit to a physical, mental or blood examination, when the physical or mental condition or blood relationship of the party is in controversy, and upon good cause shown.

Respondent's mental condition is in controversy in this proceeding. The Committee made it so when it alleged in the Notice of Hearing that Respondent's actions constitute impaired objectivity because of dysfunction as a result of a physical or mental health problem in violation of Minn. R. 7200.4810, subp. 2.D., (actually, the rule requires a **severe** physical or mental health problem), and an inability to practice psychology with reasonable skill and safety to clients due to a mental or physical illness or condition in violation of Minn. Stat. § 148.941, subd. 2(a)(9). However, the Committee has not yet demonstrated good cause to require Respondent to submit to a mental health examination as required by Minn. R. Civ. P. 35.01.

The Committee has cited *Humenansky v. Minnesota Board of Medical Examiners*, 525 N.W.2d 559 (Minn. App. 1994), rev. denied 1995, for the proposition that an individual's right to practice a profession is subject to strict regulation under the State's police power. Committee's Memorandum at 5. That decision, which upheld the Board of Medical Examiner's right to order an examination, did so under the specific facts of that case. The facts relied upon by the court included a recognition of the right to privacy, but balanced it against the fact that the examination would be conducted in accordance with the Minnesota Patient's Bill of Rights, would require her consent to every aspect of the examination in each test performed, would be administered by licensed professionals bound by standards of practice and ethical canons and would be limited to matters relating to the complaints filed against her. Thus, an order requiring a mental health examination should not be granted lightly. It is appropriate to impose a probable cause requirement of the type imposed under Minn. Stat. § 147.091, subd. 6(a), on the Board of Medical Examiners. In other words, there must be objective facts to support an honest and strong suspicion that the psychologist is unable to practice psychology with reasonable skill and safety to patients due to a mental or physical condition.

There may well be cases where expert opinion is not needed in order to support a conclusion that a licensee suffers from a mental impairment or mental disorder, but this is not one of them. Certainly the alleged actions demonstrate sexual exploitation of clients, engaging in physical intimacies with clients, and engaging in unprofessional conduct in violation of the rules and statutes, but they do not necessarily demonstrate dysfunction because of a severe mental health problem or an inability to practice psychology due to a mental illness or condition. The type and extent of the behavior may demonstrate that to a mental health professional, but without such an opinion in the record, the Administrative Law Judge cannot make that finding. The motion for an order requiring Respondent to submit to a mental health examination must be denied at this time.

Committee's Motion to Compel

As ordered by the Administrative Law Judge in a letter of March 7, 1997, the Committee served its written discovery requests upon Respondent by mail on April 1, 1997. Affidavit of Jacquelyn E. Albright, Exs. A and E. Respondent's answers were due May 15, 1997, which was stated to Respondent during telephone conferences on March 6, 1997, and April 21, 1997, and confirmed in letters from the Administrative Law Judge on March 7, 1997, and April 23, 1997. Albright Affidavit Exs. A and F.

On May 29, 1997, Ms. Albright sent Respondent a letter reminding him that his answers to the Committee's discovery requests were overdue and advising him that a motion for sanctions would be made if a response was not received by Friday, June 6, 1997. Albright Affidavit, Ex. I. Respondent has not served answers to the discovery requests as of this date.

The Committee's discovery requests are reasonable; they relate directly to the allegations in the Notice of Hearing. The Committee is entitled to receive answers to its discovery requests immediately. The Administrative Law Judge is aware that this matter has caused a great deal of stress for Respondent. That is not at all unusual in

any sort of litigation and particularly understandable when a person's professional practice is being examined. Nonetheless, the matter must proceed in order to ensure that the public is properly protected and that Respondent is treated fairly. Therefore, the Committee's motion requiring answers to the discovery requests within five days is granted.

S.M.M.